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No. 93-723

Supreme Court, U.S.
FILED
FEB 17 1994
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

X-CITEMENT VIDEO, INC. AND RUBIN GOTTESMAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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1. In our petition, we explained why the Ninth Circuit's premise for holding Section 2252(a)(1) unconstitutional—that the statute does not require proof of the defendant's knowledge that the materials at issue show minors engaged in sexually explicit acts—is incorrect. We found strong support for our position that the statute requires proof of such knowledge in the pertinent legislative history. Pet. 8-11. Respondents take issue with our reading of the legislative history, citing the Ninth Circuit's earlier decision in *United States* v. *United States District Court*, 858 F.2d 534, 538 (1988), for the proposition that "[t]he history reveals that '[t]he defendant's awareness of the subject's minority is not an element of the offense.'" Br. in Opp. 6. *District Court*, however, did not address the proper construction of the

knowledge requirement of Section 2252(a); rather, it addressed the question whether knowledge of the minority of the subject of the depiction is an element of a wholly different provision—18 U.S.C. 2251(a).

As we discussed in our petition (Pet. 9 n.3), the legislative history of Section 2251(a), which proscribes the production of child pornography, shows that Congress deliberately omitted the word "knowingly" from that statute in order to ensure that knowledge of the minority of the subject would not be considered an element of the offense. See S. Rep. No. 601, 95th Cong. 1st Sess. 5 (1977); H.R. Conf. Rep. No. 811, 95th Cong., 1st Sess. 5 (1977). By contrast, Section 2252, which was enacted as part of the same legislation as Section 2251, does contain the word "knowingly." It follows that Congress must have intended to include such a knowledge requirement in Section 2252.

2. Since we filed our petition, the Third Circuit has addressed the precise issue presented here and has resolved the issue in a manner that squarely conflicts with the decision in this case. In *United States* v. *Cochran*, No. 93-1578 (Feb. 2, 1994), that court concluded that "Congress intended [the word] knowingly as employed in [Section 2252] to require proof that the defendant knew the nature of the materials to be child pornography." Slip op. 10. Based on that conclusion, the court upheld the constitutionality of the statute. Accordingly, there now exists a clear-cut conflict in the circuits on the question whether Section 2252 is unconstitutional on the ground that it omits to require proof that the defendant knew that he was dealing in child pornography.

For the foregoing reasons and the reasons stated in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

DREW S. DAYS, III
Solicitor General

FEBRUARY 1994